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In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1499

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

DELTA METALFORMING CO., INC.,
Respondent.

BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND MOTION FOR ARGUMENT TOGETHER WITH CASE NO. 80-1251

NEIL J. O'BRIEN
GARDERE & WYNNE
1500 Diamond Shamrock Tower
Dallas, Texas 75201
(214) 748-7211
Counsel for Respondent.

SOUTHWESTERN LAW PRESS—DALLAS, TEXAS—(214) 742-3985

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Respondent's Response To The Petition For A Writ Of Certiorari

Respondent Delta Metalforming Company, Inc.[1] acknowledges that the decision of the United States

[1] Delta Metalforming Co., Inc. has no parent or subsidiary corporations and has affiliated corporations only in the sense already explained by petitioner on pages 1 and 2 of its petition for a writ of certiorari.

Court of Appeals for the Fifth Circuit in this case conflicts with the decisions of the United States Courts of Appeal for the Second, Fourth and Eighth Circuits and that the issue presented in this case is before the Court in *United States of America v. Vogel Fertilizer Company,* No. 80-1251. Respondent does not oppose the petition for writ of certiorari, but does oppose petitioner's request that a decision in this case be deferred until the Court has disposed of No. 80-1251.

REASONS FOR GRANTING RESPONDENT'S MOTION FOR ARGUMENT OF THIS CASE TOGETHER WITH CASE NO. 80-1251 IF CERTIORARI IS GRANTED IN THIS CASE

Petitioner, on page 3 of its petition for a writ of certiorari, has requested that this case be held pending the Court's disposition of *United States of America v. Vogel Fertilizer Company,* No. 80-1251. Respondent opposes that request. The Court's decision is No. 80-1251 will in all likelihood determine the outcome in this case because both cases involve the same federal tax issue of law:

> Whether a person's stock ownership can be taken into account for purposes of determining whether two corporations are members of a brother-sister controlled group of corporations under Section 1563 (a) (2) (A) of the Internal Revenue Code when that person does not own stock in each member of the alleged brother-sister controlled group and no constructive stock ownership or attribution rules apply.

Respondent should be permitted to submit a brief on the merits and present oral argument in this case. Otherwise, petitioner will have the advantage of presenting its position on the issue before the Court, but respondent will

not be able to present its views, and respondent will also be deprived of the services of the counsel of its choice in a proceeding which will have a significant effect upon its legal rights and economic interests. Respondent's participation in the briefing and in oral argument will also provide the Court with another perspective on an issue that has generated a wide range of opinion.

Respondent respectfully moves the Court to order that this case be argued together with 80-1251 pursuant to U.S. Supreme Court Rule 37.3 which states:

> "On the Court's own motion, or on motion of one or more parties, the Court may order that two or more cases, involving what appear to be the same or related questions, be argued together as one case, or on such terms as may be prescribed."

Respondent respectfully requests that the Court divide the time for oral argument allotted to the respondents in No. 80-1251 and this case equally, so that the proper interests of both the respondent in No. 80-1251 and respondent Delta Metalforming Company, Inc. may be fully represented before the Court.

CONCLUSION

If the petition for a writ of certiorari is granted in this case, the Court should not defer consideration of this case until after it renders a decision in No. 80-1251, but should order that this case be argued together with No. 80-1251 and that the respondent in each case participate in oral argument so that the interests of each may be fully represented.

Respectfully submitted,

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Neil J. O'Brien
Gardere & Wynne
Attorney for Respondent

April 6, 1981

CERTIFICATE OF SERVICE

Counsel certifies that service of this brief and motion has been made on counsel for petitioner in compliance with U.S. Supreme Court Rules 22.1, 28.3 and 28.4(a) by mailing three copies hereof by registered mail, return receipt requested, first-class postage pre-paid to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530 on April 6, 1981, being within 30 days after receipt by respondent of three copies of the petition for a writ of certiorari, and that three copies of this brief and motion have been mailed in like manner to Ronald C. Jensen of Baird, Holm, McEachen, Pendersen, Hamann & Haggart, counsel for Vogel Fertilizer Company, respondent in No. 80-1251, at 1500 Woodmen Tower, Omaha, Nebraska 68102.

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Neil J. O'Brien
Gardere & Wynne
Attorney for Respondent

STATEMENT OF FILING

Counsel certifies by a signed and notarized statement that, to the knowledge of counsel as a member of the Bar of this Court, this brief and motion is duly filed with this Court in compliance with U.S. Supreme Court Rules 22.1 and 28.2 by deposit of 40 copies thereof in a United States post office or mailbox with first-class postage prepaid and addressed to the Clerk of the Court on April 6, 1981, being within 30 days after receipt by respondent of three copies of the petition for a writ of certiorari.

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Neil J. O'Brien
Gardere & Wynne
Attorney for Respondent

STATE OF TEXAS
COUNTY OF DALLAS

The above statement has been SUBSCRIBED AND SWORN TO BEFORE ME on the sixth day of April, 1981, to certify which witness my hand and official seal.

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Notary Public in and for
Dallas County, Texas

(SEAL)